

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

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4 In re: Chapter 11
5 MPM SILICONES, LLC, et al., Case No.
6 Debtors. 14-22503-rdd

7 - - - - - x

8 BOKF, N.A., Plaintiff,
9 - against - Adv. Proc. No.
10 JPMORGAN CHASE BANK, N.A., et al. 14-08247-rdd

11 Defendants.

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13 WILMINGTON TRUST, N.A., Plaintiff,
14 - against - Adv. Proc. No.
15 JPMORGAN CHASE BANK, N.A., et al. 14-08248-rdd

16 Defendants.

17 - - - - - -x

18 **CORRECTED AND MODIFIED BENCH RULING ON DEFENDANTS' MOTIONS
19 TO DISMISS PURSUANT TO FED. R. BANKR. P. 7012**

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21 Hon. Robert D. Drain, United States Bankruptcy Judge

22 I have two motions before me to dismiss the largely

23 identical complaints of the so-called first lien trustee and

24 1.5 lien trustee under Bankruptcy Rule 7012, incorporating, in

25 this instance, Federal Rule of Civil Procedure 12(c), which

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1 provides for judgment on the pleadings.

2 The same standard applicable to motions to dismiss
3 pursuant to Federal Rule of Civil Procedure 12(b)(6) applies to
4 Rule 12(c) motions. L-7 Designs, Inc. v. Old Navy, LLC, 647
5 F.3d 419, 429-30 (2d Cir. 2011).

6 In deciding these motions, therefore, the Court must
7 assess the legal feasibility of the complaints, not weigh the
8 evidence that might be offered in their support. Koppel v.
9 4987 Corp., 167 F.3d 125, 133 (2d Cir. 1999). The Court's
10 consideration is "limited to facts stated on the face of the
11 complaint and in the documents appended to the complaint or
12 incorporated into the complaint by reference, as well as to
13 matters of which judicial notice may be taken." Hertz Corp. v.
14 City of New York, 1 F.3d 121, 125 (2d Cir. 1993), cert. denied,
15 510 U.S. 1111 (1994). See also DiFolco v. MSNBC Cable, LLC,
16 622 F.3d 104, 111 (2d Cir. 2010) ("Where a document is not
17 incorporated by reference, the court may nevertheless consider
18 it where the complaint relies heavily upon its terms and
19 effect.").

20 The Court accepts the complaints' factual allegations
21 as true even if they are doubtful in fact and must draw all
22 reasonable inferences in favor of the plaintiffs. Tellabs Inc.
23 v. Makor Issues and Rights, Ltd., 551 U.S. 308, 321-23 (2007).
24 However, the Court need not accept a complaint's allegations
25 that are clearly contradicted by documents incorporated into

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1 the pleadings. Labajo v. Best Buy Stores, LP, 478 F.Supp.2d
2 523, 528 (S.D.N.Y. 2007).

3 Moreover, the Court is not bound to accept as true "a
4 legal conclusion couched as a factual allegation." Papasan v.
5 Allain, 478 U.S. 265, 286 (1986). Instead, the complaint must
6 state more than "labels and conclusions, and a formulaic
7 recitation of the elements of a cause of action and not do."
8 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

9 In addition, while the Supreme Court has confirmed, in
10 light of the notice pleading standard of Federal Rule of Civil
11 Procedure 8(a), that a complaint does not need detailed factual
12 allegations to survive a motion under Rule 12(b)(6) -- see
13 Erickson v. Pardus, 551 U.S. 89, 93 (2007), and Twombly, 550
14 U.S. at 555 -- its "factual allegations must be enough to raise
15 a right to relief above the speculative level." Twombly, 550
16 U.S. at 555. If the claim would not otherwise be plausible on
17 its face, therefore, the complaint must alleged sufficient
18 facts to "nudge the claim across the line from conceivable to
19 plausible." Id. at 570. Otherwise, the defendant should not be
20 subjected to the burdens of continued discovery and the worry
21 of overhanging litigation. Id. at 556.

22 Applying this plausibility standard is a "context-
23 specific task that requires the reviewing court to draw on its
24 judicial experience and common sense." Ashcroft v. Iqbal, 556
25 U.S. 662, 679 (2009). "Plausibility depends on a host of

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1 considerations: the full factual picture presented by the
2 complaint, the particular cause of action and its elements, and
3 the existence of alternative explanations so obvious that they
4 render plaintiff's inferences unreasonable." L-7 Designs, Inc.
5 v. Old Navy, LLC, 647 F.3d at 430.

6 In sum, then, the Court applies a two-step approach
7 under Rule 12(c). After identifying the elements of the
8 applicable causes of action -- Ashcroft v. Iqbal, 556 U.S. at
9 675 -- the Court must first note the allegations not entitled
10 to the assumption of truth because they are only legal
11 conclusions, id. at 679-80, and, second, it must assess the
12 factual allegations in context to determine whether they
13 plausibly suggest an entitlement to relief. Id. at 681.

14 Here, the complaints (which, again, are, with the
15 exception of an allegation about the nonpayment of a financial
16 advisor's fees, essentially the same) rely upon the plaintiffs'
17 rights under an Intercreditor Agreement, or ICA, a copy of
18 which is filed on the docket and has also been attached to the
19 declaration of Samuel A. Khalil in support of defendants' reply
20 in support of their motions.

21 The complaints assert claims for various alleged
22 breaches of the Intercreditor Agreement. They also seek
23 declaratory relief regarding the meaning of the ICA and
24 injunctive relief against future breaches. Finally, the
25 complaints assert a breach of the implied covenant of good

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1 faith and fair dealing.

2 As the parties acknowledge, the Intercreditor
3 Agreement is governed by New York law, which, with respect to
4 the interpretation of contracts like the ICA, is clear. Under
5 New York law, the best evidence, and, if clear, the conclusive
6 evidence, of the parties' intent is the plain meaning of the
7 contract. Thus, in construing a contract under New York law,
8 the Court should look to its language for an agreement that is
9 complete, clear, and unambiguous on its face; and, if that is
10 the case, it must be enforced according to its plain terms. J.
11 D'Addario & Company Inc. v. Embassy Industries, Inc., 20 N.Y.3d
12 113, 118 (2012); Greenfield v. Philles Records Inc., 98 N.Y.2d
13 562, 569 (2002).

14 Ambiguity is a question of law. Consedine v.
15 Portville Cent. School District, 12 N.Y.3d 286, 294 (2009). A
16 contract is ambiguous if its terms are "susceptible to more
17 than one reasonable interpretation." Evans v. Famous Music
18 Corp., 1 N.Y.3d 452, 458 (2004). See also British
19 International Insurance Company v. Seguros La Republica, S.A.,
20 342 F.3d 78, 82 (2d Cir. 2003), in which the court states, "An
21 ambiguity exists where the terms of the contract could suggest
22 more than one meaning when viewed objectively by a reasonably
23 intelligent person who has examined the context of the entire
24 integrated agreement and who is cognizant of the customs,
25 practices, usages and terminology as generally understood in

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1 the particular trade or business."

2 Thus, while in instances of ambiguity the Court may
3 look to parol evidence, if the agreement on its face is
4 reasonably susceptible to only one meaning, that meaning
5 governs; the Court is not free to alter the contract to reflect
6 its notions of fairness or equity or extrinsic facts.

7 Greenfield v. Philles Records, Inc., 98 N.Y.2d at 569. See
8 also In re AMR Corp., 730 F.3d 88, 98 (2d Cir. 2013).

9 In construing a contract, one should be aware that an
10 entire agreement is being examined, and, therefore, the Court
11 should interpret the contract to give full meaning and effect
12 to all of its provisions. Id. at 98. An isolated provision
13 that might be susceptible to one or more readings thus should
14 not be taken out of context but should be read, instead, in the
15 context of the entire agreement, or construed in a way that is
16 plausible in the context of the entire agreement. See Barclays
17 Capital, Inc. v. Giddens, 761 F.3d 303 (2d Cir. 2014).

18 Here, as I noted, the parties are disputing the
19 defendants' obligations under the Intercreditor Agreement
20 attached as an exhibit to Mr. Khalil's declaration. As I noted
21 in my previous ruling on confirmation of the debtors' chapter
22 11 plan, the ICA is very clearly an intercreditor agreement
23 pertaining to the parties' rights in respect of shared
24 collateral. That is the overall context of the Agreement, and
25 it is in that context that the complaints' claims should be

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1 evaluated.

2 The complaints allege that the defendants breached the
3 Intercreditor Agreement by taking positions before and during
4 the course of this bankruptcy case in opposition to the
5 plaintiffs. More specifically, the complaints assert that the
6 defendants breached the ICA (a) by entering into a
7 Restructuring Support Agreement before the commencement of the
8 case in favor of what eventually became the debtors' chapter 11
9 plan and then supporting confirmation of that plan, which the
10 complaints allege adversely treats the plaintiffs by "cramming
11 down" the plaintiffs' claims under section 1129(b) of the
12 Bankruptcy Code, and (b) by intervening support of the debtors'
13 objections to the plaintiffs' right to a make-whole payment
14 under their indentures and notes and similar claims based on
15 the prepayment of their debt.

16 The plaintiffs also contend that the defendants
17 breached the Intercreditor Agreement (a) by supporting the
18 debtors' financing (apparently, although not expressly stated
19 in the complaints, the postpetition or "DIP" financing under
20 section 364 of the Bankruptcy Code as approved by the Court)
21 that was given a lien with priority over the plaintiffs' liens,
22 and (b) by opposing the plaintiffs' requests for adequate
23 protection of their interests in the shared collateral and, as
24 more specifically alleged in the first lien trustee's
25 complaint, objecting to the ongoing reimbursement of the first

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1 lien trustee's financial advisor's fees and expenses during the
2 course of this case as a proposed form of adequate protection
3 of the trustee's lien.

4 Lastly, and perhaps most significantly for purposes of
5 the underlying economics of this litigation, the complaints
6 allege that the defendants breached the Intercreditor Agreement
7 by agreeing to receive in return for their secured claims
8 property that the plaintiffs contend constitutes "Common
9 Collateral," a defined term in the Intercreditor Agreement, or
10 the proceeds thereof, while holding that property in trust for
11 the plaintiffs until the plaintiffs' "Senior Lender Claims" --
12 another defined term in the Agreement -- have been paid in full
13 in cash.

14 The Common Collateral or its proceeds allegedly
15 improperly retained by the defendants as secured creditors
16 includes (a) a potential \$30 million charge under a Backstop
17 Agreement pursuant to which defendants agreed to backstop a
18 \$600 million rights offering to partially fund the chapter 11
19 plan, (b) the fees and expenses of various counsel and
20 financial advisors for the plaintiffs that the debtors have
21 reimbursed on an ongoing basis during the course of this case,
22 which apparently (although I am not prepared to find this
23 conclusively for reasons discussed below) were paid pursuant to
24 the Restructuring Support Agreement between the debtors and
25 defendants that was eventually approved by the Court, although

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1 possibly also paid as a form of adequate protection of the
2 defendants' interests in the shared collateral, and (c) 100
3 percent of the common stock of the reorganized parent debtor,
4 to be distributed to the defendants under the chapter 11 plan
5 in exchange for their claims against the debtors.

6 The complaints rarely, if ever, specify the provisions
7 of the Intercreditor Agreement that are claimed to have been
8 breached by the foregoing conduct. I have reviewed the ICA,
9 therefore, to see what provisions might apply and also
10 requested counsel during oral argument to highlight the
11 provisions that they believe apply.

12 Let me address first the complaints' claims based on
13 the defendants' alleged objections to the plaintiffs' receipt
14 of adequate protection of their interests in the shared
15 collateral and the claims based on the defendants' alleged
16 support of a priming lien. Section 6.3 of the ICA provides, "No
17 Second-Priority Party [which admittedly would include the
18 defendants] will contest or support any other person contesting
19 (a) any request by the Senior Lenders for adequate protection,
20 or (b) any objection by the Senior Lenders to any motion based
21 on the Senior Lenders' claiming a lack of adequate protection."

22 The first lien trustee's complaint alleges in a
23 conclusory fashion that the defendants either contested or
24 supported other persons in objecting to the first lien holders'
25 right to adequate protection of their liens in the shared

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1 collateral. The complaint's only non-conclusory assertion of
2 such conduct is its allegation that the defendants objected to
3 the current payment, as a form of adequate protection, of the
4 fees and expenses of the financial advisor for the first lien
5 trustee. The complaint does not state, however, how the
6 defendants raised such an objection. I am not aware of any
7 such action taken by the defendants in court, moreover, and
8 such an objection does not appear on the docket. I conclude,
9 therefore, that the first lien trustee's complaint does not
10 satisfy the initial requirement of Twombly, Iqbal and L-7
11 Designs, namely, that on this claim it states no more than a
12 conclusory recitation of the cause of action. The 1.5 lien
13 trustee's complaint lacks even the allegation of an objection
14 by the defendants to any specific aspect of proposed adequate
15 protection; therefore, it, too, fails the first prong of
16 Twombly, Iqbal and L-7 Designs and does not assert a claim for
17 breach of section 6.3 of the ICA.

18 I could go further, as the defendants also request,
19 and hold that under no circumstances would the defendants'
20 objection to the provision of adequate protection of the
21 plaintiffs' interests in the shared collateral, including in
22 the form of reimbursement of advisors' fees, ever give rise to
23 a cause of action for breach of section 6.3 of the ICA, but I
24 am reluctant to do so without seeing more of what the
25 defendants are alleged to have done to breach that provision.

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1 To persuade me otherwise, the defendants rely heavily
2 on a decision that also construed an intercreditor agreement
3 pertaining to the rights of secured creditors in shared
4 collateral, In re Boston Generating LLC, 440 B.R. 302 (Bankr.
5 S.D.N.Y. 2010). The agreement at issue in that case, like the
6 ICA, expressly acknowledged the right of the junior, or second-
7 priority lien holders to assert their rights as unsecured
8 creditors; and Judge Chapman concluded, based on her finding
9 that the junior lien holders' allegedly wrongful conduct
10 comprised no more than the assertion of rights available to
11 unsecured creditors, that such holders were not prohibited from
12 objecting to a sale of the shared collateral that was supported
13 by the senior lien holders notwithstanding other provisions in
14 the agreement that precluded them from taking actions contrary
15 to the senior lien holders' rights in the collateral (although
16 she found it "a very close call"). Id. at page 320.

17 Here, the ICA's provision permitting the second-
18 priority secured parties to act in their capacity as unsecured
19 creditors is quite broad, and, as in Boston Generating, the
20 plaintiffs concede that the defendants have a substantial
21 unsecured, deficiency claim under section 506(a) of the
22 Bankruptcy Code, that is, that the defendants also are
23 unsecured creditors with rights to assert under the provision.
24 Section 5.4 of the Intercreditor Agreement, titled "Rights as
25 Unsecured Creditors," provides, "Notwithstanding anything to

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1 the contrary in this Agreement, the Second-Priority Agents and
2 the Second-Priority Secured Parties may exercise rights and
3 remedies as an unsecured creditor against the Company or any
4 Subsidiary that has guaranteed the Second-Priority Claims in
5 accordance with the terms of the applicable Second-Priority
6 Documents and applicable law." (Emphasis added.) The
7 defendants argue that this provision trumps ICA section 6.3's
8 prohibition of objections to any request by the senior
9 lienholders for adequate protection, because such an objection
10 to the debtors' proposed grant of adequate protection could be
11 equally raised by an unsecured creditor.

12 I can see a possible plausible reading of ICA section
13 5.4, however, that might require a more nuanced approach to
14 actions of the second lien holders that conflict with other
15 provisions of the ICA. For example, if the debtors were
16 advocating a reasonable treatment of the first and 1.5 lien
17 holders' interests in the shared collateral that the second
18 lien holders opposed, once could question whether the second
19 lien holders were exercising "rights and remedies . . . against
20 the [debtors]" as required by the exemption in ICA section 5.4,
21 because the debtors were doing nothing objectionable. Judge
22 Chapman made a similar observation in Boston Generating, 440
23 B.R. at 320, distinguishing the junior lien holders' conduct in
24 that case from the "obstructionist behavior of the junior lien
25 holder in Ion Media Networks, Inc. v. Cyrus Select

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1 Opportunities Master Fund Ltd., 419 B.R. 585, 588-89, 595-95
2 (Bankr. S.D.N.Y. 2009), app. dismissed, 480 B.R. 494 (S.D.N.Y.
3 2012). In other words, ICA section 5.4, when read in context
4 with other provisions of the ICA, may require the junior lien
5 holders to assume the risk that they do not have a valid
6 argument to oppose the debtors' proposed action. However, not
7 having sufficient facts stated in the complaints, I am not
8 prepared to rule either way on this point. Thus, I will simply
9 hold that any claim in either complaint based upon an alleged
10 breach of ICA section 6.3 is dismissed on the ground that, as
11 pled, such claim does not pass the first test of Twombly, Iqbal
12 and L-7 Designs, having been asserted in a merely conclusory
13 fashion that leaves both the defendants and the Court guessing
14 at the claim's factual basis.

15 The complaints' claim based on the defendants' support
16 of a priming lien in a third-party financing also fails to
17 state what actions the defendants took to support the issuance
18 of such a lien. Moreover, the complaints' failure to identify
19 the particular section of the Intercreditor Agreement allegedly
20 breached takes on greater significance because, based on my
21 review, the ICA nowhere prohibits junior lien holders from
22 supporting a priming lien financing, and counsel have not
23 identified one. In fact, it appears that the only prohibition
24 in the ICA relating to priming liens bars objections to such
25 liens that are supported by the senior lien holders.

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1 The plaintiffs acknowledged at oral argument,
2 moreover, that they never objected to the priming lien in the
3 DIP financing and stated that they view this claim as being
4 more akin to their other unspecified claims for breach of ICA
5 section 6.3, namely, that it relates to unspecified objections
6 to the provision of adequate protection to the senior lien
7 holders' interests in the shared collateral that arose in the
8 context of the debtors' motion for approval of the DIP
9 financing. This, of course, makes the claim even more nebulous.

10 Therefore, for the same reasons that I dismissed the
11 complaints' claim based upon ICA section 6.3, I will also
12 dismiss any claim based upon alleged support for the issuance
13 of a new priming lien, although I reiterate that the factual
14 support in the record -- and obviously I can take judicial
15 notice of the docket of this case -- as well as any support for
16 this claim in the ICA, other than, arguably, if facts are
17 further pled to fit it into section 6.3 of the ICA, is lacking.

18 Next, the complaints assert claims that the defendants
19 have violated the Intercreditor Agreement by supporting (a) the
20 debtors' objection to the first and 1.5 lien holders' right to
21 a make-whole payment or similar claim based on the plan's
22 prepayment of their debt, and (b) confirmation of the debtors'
23 chapter 11 plan over the plaintiffs' objections on a cramdown
24 basis. As to the first claim, the plaintiffs have conceded
25 that if the Court's ruling disallowing their make-whole right

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1 as a matter of New York law becomes a final order, they would
2 not have a claim for breach of the ICA based on the defendants'
3 support of the debtors' position on the issue. I believe the
4 same logic would apply to the defendants' support of the
5 debtors' objection (a) to the plaintiffs' claim under New York
6 law based on a non-call right, which I found in the same ruling
7 the plaintiffs lack because there is no specific non-call
8 provision in their indentures and notes, and (b) to the
9 plaintiffs' claim based on the debtors' alleged breach of New
10 York's rule of perfect tender, which precludes any prepayment
11 of a note.

12 There is no final order in this case on these issues,
13 as they are subject to pending appeals. However, I believe
14 that in reviewing the complaints I should follow my prior
15 rulings, which are the law of the case, on the plaintiffs' lack
16 of either a make-whole right or a non-call claim under New York
17 law and, therefore, find, as conceded, that the ICA has not
18 been breached by the defendants' support of the debtors' claim
19 objections. I also believe, although not having expressly
20 found before, that the make-whole provisions in the first and
21 1.5 lien indentures and notes modified New York's rule of
22 perfect tender, and, therefore, that the plaintiffs would not
23 have a claim under New York law for breach of that rule, which
24 is modifiable by contract, either. See U.S. Bank National
25 Association v. South Side House, LLC, 2012 U.S. Dist. LEXIS

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1 10824, at *12-13 (E.D.N.Y. Jan. 30, 2012); Northwestern Mutual
2 Life Ins. Co. v. Uniondale Realty Assoc., 816 N.Y.S.2d 831,
3 835, 11 Misc.3d 980, 984 (N.Y. Sup. Ct. 2006; see generally
4 Charles & Kleinhaus, "Prepayment Claims in Bankruptcy," 15 Am.
5 Bankr. Inst. L. Rev. 537, 541 (Winter 2007). (My prior
6 decision on the plaintiffs' right to such a claim was not based
7 on that conclusion because I found that the claim would not be
8 allowed, in any event, under sections 502(b)(2) and 506(b) of
9 the Bankruptcy Code.) Thus, by supporting the debtors'
10 objections to these claims, the defendants did no more than
11 ensure that the debtors objected to claims that do not exist
12 under state law; as conceded by the plaintiffs, the defendants
13 cannot be liable under the ICA for objecting to invalid claims.

14 There are other, alternative reasons, moreover, why
15 the complaints fail to assert a claim based on the defendants'
16 objections to the make-whole and related claims and their
17 support of confirmation of the debtors' plan. First, however,
18 it is important to reiterate the context of the Intercreditor
19 Agreement, which is well summarized in Boston Generating:

20 Interpreting text requires some discussion and
21 understanding of context. If one were to explain, in
22 lay terms, the purpose and function of an
23 intercreditor agreement between first lien parties
24 and second lien parties, the explanation would
25 include the notion, as the first lien agent stated,
that first lien lenders would be 'in the driver's
seat' when it came to decisions regarding collateral.
In other words, or to use a different metaphor, the
second lien lenders agree not to use their
subordinated lien as an offensive weapon against

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1 first lien lenders with respect to collateral.
2 Notwithstanding their agreement to be subordinated,
3 second lien lenders do retain certain rights under a
4 typical intercreditor agreement, including the right
5 to appear and be heard in a bankruptcy case as
6 unsecured creditors. This right includes making
7 arguments that an unsecured creditor would have the
8 standing (and the economic interest) to assert and
9 those arguments that are not expressly waived by the
10 intercreditor agreement.

11 440 B.R. 318. I made a similar observation about the ICA's
12 context in my confirmation ruling.

13 Judge Chapman also states in Boston Generating -- and
14 I believe this view is appropriate both under section 510(a) of
15 the Bankruptcy Code, which enforces subordination agreements,
16 and the law of New York -- that waivers of a secured creditor's
17 rights under such agreements "must be clear beyond
18 peradventure." Id. at 319.

19 The focus, therefore, of an intercreditor agreement
20 between two groups of secured lenders, such as the one at issue
21 here, is on their rights in and remedies in respect of the
22 shared collateral. That context helps explain what is,
23 frankly, clear language in the ICA, in any event, to the extent
24 it pertains to the types of actions that are at issue in this
25 aspect of my ruling. Unlike actions directly pertaining to
adequate protection, which directly affect the secured
creditors' interests in the shared collateral, the defendants'
objections to the amount of the senior lien holders' claims
under applicable law, whether it be New York or bankruptcy law,

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1 and support of the debtors' cramdown chapter 11 plan -- unless
2 very clearly precluded or constrained by an intercreditor
3 agreement of this nature, should not be curtailed. They are
4 not positions taken with respect to the parties' rights in the
5 shared collateral; instead, they pertain to the amount and
6 treatment of the senior lien holders' claims based on arguments
7 that any unsecured creditor could reasonably make.

8 Here the language relied upon by the plaintiffs is not
9 the specific language of ICA section 6.3 but a broad reading of
10 section 3.1(c) of the ICA, which provides that

11 Each Second-Priority Agent, for itself and on behalf
12 of each applicable Second-Priority Secured Party,
13 agrees that no Second-Priority Agent or Second-
14 Priority Secured Party will take any action that
15 would hinder any exercise of remedies undertaken by
16 the Intercreditor Agent or the Senior Lenders with
17 respect to the Common Collateral under the Senior
18 Lender Documents, including any sale, lease,
19 exchange, transfer or other disposition of the Common
20 Collateral, whether by foreclosure or otherwise; and
21 each Second-Priority Agent, for itself and on behalf
22 of each applicable Second-Priority Secured Party,
23 hereby waives any and all rights it or any Second-
24 Priority Secured Party may have as a junior lien
25 creditor or otherwise to object to the manner in
which the Intercreditor Agent or the Senior Lenders
seek to enforce or collect the Senior Lender Claims
or the Liens granted in any of the Senior Lender
Collateral, regardless of whether any action or
failure to act by or on behalf of the Intercreditor
Agent or Senior Lenders is adverse to the interests
of the Second-Priority Secured Parties.

(Emphasis added.)

As I've stated, ICA section 5.4, however, provides
that, "Notwithstanding anything to the contrary in this

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1 Agreement, the Second-Priority Agents and the Second-Priority
2 Secured Parties may exercise rights and remedies as an
3 unsecured creditor against the Company or any Subsidiary that
4 has guaranteed the Second-Priority Claims in accordance with
5 the terms of the applicable Second-Priority Documents and
6 applicable law."

7 With regard to the defendants' objections to the
8 plaintiffs' make-whole and similar claims, then, it appears
9 clear to me -- and the ICA, I believe, is unambiguous on this
10 point -- that the defendants were not acting contrary to
11 section 3.1(c) of the Intercreditor Agreement, which pertains
12 to objecting the plaintiffs' enforcement and exercise of
13 remedies in respect of the Common Collateral. It is true that
14 those remedies are to be enforced pursuant to the underlying
15 documents, which, among other things, serve as the basis for
16 the senior lien holders' claims, but the ICA in general, and
17 section 3.1(c) in particular, is not a claim or debt
18 subordination agreement. Its focus generally and in section
19 3.1(c) in particular is on the secured lenders' enforcement of
20 their remedies in the collateral, not on the amount of the
21 lenders' claims. Thus, objecting to the amount of the
22 plaintiffs' claims would not give rise to a breach of ICA
23 section 3.1(c) even if such objection was ultimately denied
24 (which, of course, has not occurred here).

25 As I noted, the debtors already took the position that

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1 the secured lenders were not entitled to a make-whole or
2 similar claim. Thus it seems to me that the only claim the
3 plaintiffs might assert against the defendants under section
4 3.1(c) would be based on their having egged on the debtors to
5 object, or causing the debtors to do so, but, again, that would
6 be consistent with the defendants' rights against the debtors
7 under ICA section 5.4 to ensure that the debtors have acted
8 properly, as fiduciaries to unsecured creditors, in objecting
9 to claims that arguably do not have a basis in law.

10 A similar analysis was undertaken by Judge Chapman in
11 Boston Generating, although the senior lien holders'
12 representative there conceded that the lien holders were not
13 effecting or taking enforcement actions in respect of the
14 shared collateral when supporting the proposed sale, whereas
15 the plaintiffs have not so conceded here. But that distinction
16 is less significant than the fact that the defendants' claim
17 objection was just that, a claim objection, rather than
18 opposition to the plaintiffs' pursuit of remedies in respect of
19 the shared collateral. In this context ICA section 5.4 must be
20 read to give the defendants the unfettered right to act as
21 unsecured creditors to object to the senior lien holders'
22 claims. Such actions would not conflict with any more specific
23 provision in the ICA in a way that might create any contextual
24 ambiguity.

25 The complaints' claim based on the defendants' support

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1 of the cramdown plan is a closer question, in that cramdown
2 under section 1129(b) of the Bankruptcy Code affects the manner
3 in which the senior lien holders will be paid under the plan,
4 not the amount of their claim. Thus, arguably, by supporting a
5 cramdown plan the defendants were opposing the senior lien
6 holders' enforcement of their lien rights in the bankruptcy
7 case.

8 Again, however, the debtors advocated cramdown in any
9 event. Thus, to the extent that the complaints could assert a
10 claim a based on the defendants' support of the debtors'
11 cramdown plan, it would, again, be based upon the defendants'
12 encouragement of the debtors to proceed on that course. This I
13 believe, however, was permitted by ICA section 5.4. The
14 debtors' pursuit of the cramdown plan was, as I found at least,
15 proper under the Bankruptcy Code and applicable precedent at
16 the Supreme Court and Second Circuit level and, therefore, I
17 believe that the defendants' encouragement of that course was
18 the type of action, consistent with Boston Generating and in
19 contrast with Judge Chapman's citation to Ion Media, that any
20 unsecured creditor would rightly take. It was not a holdup; it
21 was, instead, consistent with ICA section 5.4, merely ensuring
22 that the debtors acted properly in the interests of unsecured
23 creditors in not overpaying the plaintiffs with a higher
24 present value rate under section 1129(b)(2)(A)(i)(II) of the
25 Bankruptcy Code.

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1 Therefore, as an alternative basis for dismissing both
2 of these claims, I conclude that the defendants' actions in
3 support of the debtors' proper exercise of their duties to
4 unsecured creditors with regard to the make-whole claim and the
5 cramdown plan were permitted under section 5.4 of the
6 Intercreditor Agreement.

7 In this regard, the loosely drafted ICA is quite
8 different than the agreement in In re Erickson Retirement
9 Communities LLC, 425 B.R. 309, 313 (Bankr. N.D. Tex. 2010),
10 which contained very tight language prohibiting the junior lien
11 holders from taking almost every action against the general
12 interests of the senior secured party -- where the junior lien
13 holders would, in the court's phrase, be "silent seconds" and
14 yield in all respects to the senior lien holder until the claim
15 of the senior lien holder was fully satisfied. Id. at 314.
16 Clearly, more was required here to have rendered the defendants
17 silent on these types of issues.

18 Lastly, the complaints allege that the defendants have
19 breached section 4.2 of the Intercreditor Agreement by
20 receiving and retaining, or supporting a chapter 11 plan under
21 which they will receive and retain, (a) a possible \$30 million
22 charge under the Backstop Agreement in connection with the \$600
23 million rights offering, (b) ongoing cash reimbursement of
24 their professional fees, and (c) in return for their secured
25 and unsecured claims, their distribution under the confirmed

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1 plan in the form of 100 percent of the new common stock of the
2 reorganized parent debtor. It is alleged that the defendants'
3 retention of these three forms of consideration violates
4 paragraph 4.2 of the ICA, which states,

5 Application of Proceeds. After an event of default
6 under any First lien Indebtedness has occurred with
7 respect to which the Intercreditor Agent has provided
8 written notice to each Second-Priority Agent, and
9 until such event of default is cured or waived, so
10 long as the Discharge of Senior Lender Claims has not
11 occurred, the Common Collateral or proceeds thereof
12 received in connection with the sale or other
13 disposition of, or collection on, such Common
14 Collateral upon the exercise of remedies, shall be
15 applied by the Intercreditor Agent to the Senior
16 Lender Claims in such order as specified in the
17 relevant Senior Lender Documents until the Discharge
18 of Senior Lender Claims has occurred.

19 (Emphasis added.)

20 As relevant, the ICA defines "Discharge" as the
21 "payment in full in cash (except for contingent indemnities and
22 cost and reimbursement obligations to the extent no claim has
23 been made) of (a) all Obligations in respect of all outstanding
24 First Lien Indebtedness." (Emphasis added.) Under the chapter
25 11 plan, the first lien and 1.5 lien holders are not being paid
all of their Obligations in cash; they are instead receiving
cramdown notes, with their liens continuing to attach to all of
their prepetition collateral, i.e., cramdown treatment under
section 1129(b)(2)(A)(i) of the Bankruptcy Code.

26 The plaintiffs' argument that they are entitled to
27 receive any distributions made to the second lien holders until
28

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1 the senior lien holders are paid in full in cash hinges on,
2 then, the plain language of section 4.2 of the ICA coming into
3 play upon the second lien holders' receipt of any "Common
4 Collateral or proceeds thereof . . . in connection with the . .
5 . disposition of, or collection on, such Common Collateral upon
6 the exercise of remedies." The plaintiffs argue that all three
7 forms of the foregoing consideration received or to be received
8 by the defendants constitute "Common Collateral or the proceeds
9 thereof" received by the defendants as second lien holders "in
10 connection with the disposition of, or collection on, such
11 Common Collateral upon the exercise of remedies" and therefore
12 should be turned over to the plaintiffs until the plaintiffs
13 are paid in full in cash.

14 I conclude, however, that the motions should be
15 granted and the claims dismissed with respect to the \$30
16 million charge under the Backstop Agreement. While that cash
17 could be viewed as Common Collateral (although all parties
18 recognize that such collateral does not comprise all of the
19 debtors' assets), the payment, if made, will be based on the
20 defendants' rights under the Backstop Agreement, not in respect
21 of remedies as secured creditors. Such payment would not be on
22 account of a secured obligation but, rather, a separate,
23 unsecured obligation undertaken by the debtors to the
24 defendants for backstopping new exit financing for the debtors
25 beyond the time provided in the Backstop Agreement. The

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1 defendants therefore would not be exercising remedies as
2 secured creditors against the Common Collateral for purposes of
3 triggering ICA section 4.2 if they receive the \$30 million.

4 I cannot discern the basis for the defendants' right
5 to be reimbursed their professional fees currently during this
6 case, because the complaints do not it make clear and no party
7 has identified it in documents that I may consider in
8 connection with these motions. Indeed, there may be more than
9 one source for the defendants' right to such payments,
10 including (a) under the Court-approved Restructuring Support
11 Agreement in the form of an unsecured administrative expense,
12 which, as not deriving from the exercise of remedies against
13 the Common Collateral, may not support a claim under section
14 4.2 of the Intercreditor Agreement, and/or (b) as part of the
15 provision of adequate protection of the defendants' lien, which
16 arguably would violate section 4.2. Unlike with respect to my
17 ruling on the complaints' claim based on the \$30 million
18 payment under the Backstop Agreement, therefore, I am not
19 prepared to rule, as the defendants request, that their right
20 to retain such fees is under no scenario a right implicated by
21 their exercise of a remedy relating to the Common Collateral
22 and, therefore, under no circumstances, a breach of ICA section
23 4.2.

24 On the other hand, the complaints' failure to specify
25 the grounds on which the defendants have retained their ongoing

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1 professional fee reimbursements requires the dismissal of the
2 claim under Twombly, Iqbal and L-7 Designs. The defendants and
3 the Court are forced to guess the basis for the claim (or, more
4 aptly, whether any facts show that the defendants received
5 their professional fee reimbursements in the exercise of their
6 remedies with respect to the Common Collateral). Therefore, I
7 will dismiss the claim under ICA section 4.2 for the
8 defendants' retention of payment of professional fees on that
9 basis.

10 The common stock in the newly reorganized debtor that
11 the defendants are to receive under the chapter 11 plan is
12 concededly not Common Collateral. Neither the first, 1.5, nor
13 second lien holders have a lien on that stock. (Nor do they
14 have a lien on the parent corporation's current stock.)
15 Accordingly, the plaintiffs cannot argue that section 4.2 has
16 been breached by the defendants' retention of stock distributed
17 to them under the plan on the basis that it is Common
18 Collateral.

19 The plaintiffs argue, however, that the new stock
20 distributed under the plan constitutes "proceeds" of the Common
21 Collateral as used in the phrase "any Common Collateral or
22 proceeds thereof received by any Second-Priority Secured Party"
23 in ICA section 4.2. They rely on the definition of "proceeds"
24 in section 9-102(a)(64) of the New York U.C.C., which was
25 enacted in 2001 to expand on, and resolve ambiguities in, the

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1 definition of "proceeds" in former U.C.C. section 9-306.

2 Official Comment to U.C.C. section 9-102(a), par. 13.

3 U.C.C. section 9-102(a)(64) includes the following
4 property as "proceeds": "(A) [w]hatever is acquired upon the
5 sale, lease, license, exchange, or other disposition of
6 collateral; (B) whatever is collected on, or distributed on
7 account of, collateral; (C) rights arising out of collateral;
8 (D) to the extent of the value of collateral, claims arising
9 out of the loss, nonconformity, or interference with the use
10 of, defects or infringement of rights in, or damage to, the
11 collateral; or (E) to the extent of the value of collateral and
12 to the extent payable to the debtor or the secured party,
13 insurance payable by reason of the loss or nonconformity of,
14 defects or infringement of rights in, or damage to, the
15 collateral."

16 The plaintiffs contend that the defendants are being
17 distributed new stock under the plan "on account of" the Common
18 Collateral (or at least on account of a portion of the
19 collateral, as it is acknowledged that a significant amount, in
20 fact the majority, of the second lien holders' claims are
21 unsecured, deficiency claims), or that the distribution of the
22 stock is in respect of "rights arising out of" Common
23 Collateral, and, therefore, that such stock constitutes
24 proceeds of the Common Collateral for purposes of U.C.C.
25 section 9-102(a)(64).

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1 As a matter of law, however, I conclude that the new
2 stock to be distributed to the defendants under the plan is not
3 proceeds of the Common Collateral for purposes of New York
4 U.C.C. section 9-102(a)(64), or, for that matter, any other
5 definition of collateral proceeds. From the perspective of the
6 debtors, that stock is not something that any currently secured
7 party's existing lien would attach to even under the expansive
8 definition of "proceeds" in section 9-102(a)(64), because the
9 new common stock comprises proceeds of the defendants' liens
10 and claims, not the proceeds of the debtors' assets that
11 constitute the Common Collateral. It is being received
12 therefore on account of or based on rights arising out of the
13 defendants' liens and claims, not on account of the Common
14 Collateral or based on rights arising out of the Common
15 Collateral. A party with a lien on the defendants' rights
16 against the debtors could assert that lien against the new
17 common stock to be issued under the plan as the proceeds of its
18 collateral; a creditor, such as the plaintiffs, with a lien on
19 the debtors' assets could not, however, assert a lien against
20 that stock because the debtors' assets -- the Common Collateral
21 -- have not been disbursed or distributed with, or otherwise
22 affected by, the disbursement of the new stock. The Common
23 Collateral remains, instead, unaffected. The defendants' lien
24 will change (it, along with the defendants' unsecured claims,
25 will be released under the plan in exchange for the new common

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1 stock); however, the property constituting the Common
2 Collateral will not change. Therefore, the new stock is not
3 proceeds of the Common Collateral.

4 The point can be made from the plaintiffs'
5 perspective, too. Under the confirmed chapter 11 plan, the
6 first and 1.5 lien holders continue to retain their liens on
7 all of the Common Collateral. That collateral will not have
8 been diminished one iota by the distribution of new stock under
9 the plan to the defendants. Indeed, the distribution of that
10 stock and the related discharge of debt owed to the second lien
11 holders improves the rights of the first and 1.5 lien holders
12 in the Common Collateral because the plaintiffs will no longer
13 have to worry about any second lien holder exercising any
14 rights in respect of such collateral. But, more importantly,
15 the property constituting the Common Collateral has stayed the
16 same. There has been no economic event altering the nature of
17 those assets that gives rise to proceeds. Instead, the
18 defendants now have a right to receive new stock in the
19 reorganized enterprise in return for the discharge of their
20 prior liens and claims; the debtors have not received such
21 stock in lieu of any Common Collateral, which fully remains,
22 again, subject to the plaintiffs' liens.

23 As stated in Official Comment 13 to New York U.C.C.
24 section 9-102(a)(64), the amended definition of "proceeds" was
25 intended to address cases that had too narrowly read the prior

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1 definition in U.C.C. section 9-306. As discussed in a seminal
2 article that influenced, as well as was influenced by, the
3 effort to amend the U.C.C.'s definition of "proceeds," R.
4 Wilson Freyermuth, "Rethinking Proceeds: The History,
5 Misinterpretation and Revision of U.C.C. Section 9-306," 69
6 Tul. L. Rev. 645 (1995), "proceeds" of collateral should
7 include in an economic sense whatever results from the
8 transformation of collateral; or, as Freyermuth states, "In an
9 economic sense, the term 'proceeds' properly includes whatever
10 assets the debtor receives by virtue of an event that exhausts
11 or consumes some of the collateral's economic value or
12 productive capacity." Id. at 667.

13 That would include, as specifically addressed by
14 subsection (E) of the definition in U.C.C. section 9-
15 102(a)(64), insurance, which some cases had excluded from the
16 prior definition; or, in subsection (D), rights based on
17 nonconformity, interference with the use of, or defects, or
18 infringement of rights in, or damage to, collateral; or, in
19 fact, anything that reflects a change in the collateral, as the
20 collateral proceeded from one form of economic value to
21 another. Underlying this common-sense approach is the notion
22 that the secured creditor bargained for a lien on a piece of
23 property. If that property is altered, the secured creditor is
24 entitled to it in its altered form, as collateral proceeds if
25 the parties' intended the lien to extend to proceeds. Thus, if

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1 collateral is damaged, the secured creditor's lien should
2 extend to its proceeds in the form of insurance, and if the
3 value of collateral in the form of intellectual property is
4 reduced by infringement, the secured creditor's lien should
5 extend to the debtor's infringement claim, as proceeds.

6 Thus, for example, the definition enacted in U.C.C.
7 section 9-102(a)(64) would overrule Hastie v. FDIC, 20 F.3d
8 1042 (10th Cir. 1993), which held that stock dividends would not
9 constitute proceeds of a lien on stock although the value of
10 the stock was clearly reduced by the dividend. See Official
11 Comment 13(a) to N.Y. U.C.C. section 9-102(a)(64).

12 Here, the Common Collateral has not changed in any way
13 as a result of the issuance and distribution of the new stock.
14 Therefore, to argue that the new stock received by the
15 defendants constitutes the proceeds of the first and 1.5 lien
16 holders' collateral would unfairly add to such collateral, the
17 value of which obviously dilutes the value of the new stock,
18 whereas the issuance of the new stock does not dilute the value
19 of the Common Collateral. See Beal Bank, S.S.B. v. Waters Edge
20 Ltd. P'ship, 248 B.R. 668, 679-90 (D. Mass 2000) (transfer of
21 equity in the debtor is not a sale of property subject to a
22 lien on debtor's assets).

23 To hold otherwise, as pointed out by the defendants'
24 reply brief, also would contradict the case law addressing
25 whether a secured creditor receives the "indubitable

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1 equivalent" of its secured claim under section
2 1129(b)(2)(A)(iii) of the Bankruptcy Code if it receives stock
3 in the reorganized enterprise as part of cramdown treatment
4 under a chapter 11 plan. See, e.g., In re San Felipe @ Voss,
5 Ltd., 115 B.R. 526, 531 (S.D. Tex. 1990); 7 Collier on
6 Bankruptcy, par. 1129.04[2][c] (16th ed. 2014) at 1129-129.
7 Obviously, if the stock were collateral proceeds to which the
8 creditor's lien would attach, it would not be substitute
9 collateral appropriate for analysis under the "indubitable
10 equivalent" cramdown alternative in section
11 1129(b)(2)(2)(A)(iii). Very clearly, however, a secured
12 creditor is not getting the proceeds of its collateral when it
13 gets stock in the reorganized entity, unless, of course, that
14 stock was paid by a third-party buyer in return for the
15 debtor's assets comprising the collateral. See 124 Cong. Rec.,
16 H11,104 (Daily Ed. Sept. 28, 1978).

17 I therefore will dismiss the complaints' claim
18 premised on the alleged breach of section 4.2 of the
19 Intercreditor Agreement arising from the defendants' receipt
20 and retention of new common stock as their distribution under
21 the chapter 11 plan, because such stock is neither Common
22 Collateral nor the proceeds of Common Collateral. Given that
23 conclusion, I do not need to consider the defendants' other
24 arguments in support of their request to dismiss this claim.

25 The complaints also assert a breach of the implied

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1 covenant in every New York contract of good faith and fair
2 dealing. The parties agree, though, that this claim survives
3 only if there is a relevant ambiguity in the Intercreditor
4 Agreement that might give rise to such a duty or if the ICA
5 imposes a duty on the defendants although not necessarily
6 expressly states such a duty, for example, a duty not to
7 violate the spirit of the ICA or not to thwart its operation.

8 To the extent that I have interpreted the plain
9 meaning of the Intercreditor Agreement to preclude the
10 plaintiffs' claims, therefore, I also dismiss their claims for
11 breach of the duty of good faith and fair dealing. That would
12 apply to my rulings on the alleged breaches of ICA section 4.2
13 based on the defendants' receipt and retention of new common
14 stock under the plan and the \$30 million backstop charge, as
15 well as my ruling on the alleged breach of ICA section 3.1(c)
16 based on the defendants' objection to the plaintiffs' make-
17 whole and related claims and their support of confirmation of
18 the chapter 11 plan.

19 Otherwise the plaintiffs' breach of good faith and
20 fair dealing claims would survive to the extent that I found
21 any ambiguity in the ICA or a violation of the spirit of the
22 ICA. However, because I have dismissed the complaints'
23 remaining claims because they were stated in no more than a
24 conclusory fashion, I also will dismiss the related breach of
25 good faith and fair dealing claims. I will, however, give the

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1 plaintiffs thirty days to move under Fed. R. Bankr. P. 7015 to
2 amend their complaints in respect of the claims that I have
3 dismissed solely on the basis of Twombly, Iqbal and L-7
4 Designs. Such motion should attach the proposed amended
5 complaint as an exhibit. The remaining good faith and fair
6 dealing claims will be evaluated if the plaintiffs' file such
7 Rule 15 motions.

8 Again, however, I will not permit a motion to amend
9 those claims where I found another basis for dismissal, which
10 are dismissed with prejudice. Counsel for the defendants should
11 submit a proposed order consistent with this ruling, having
12 first circulated it to counsel for the plaintiffs.¹

13 Dated: White Plains, New York
14 October 14, 2014

15 /s/ Robert D. Drain
16 United States Bankruptcy Judge

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24 ¹ The motions also assert that the Court does not have in personam
25 jurisdiction over some or all of the defendants. Because the defendants have
not provided factual support for that assertion, however, this ruling is
without prejudice to any party's arguments regarding in personam
jurisdiction.

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